

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TED L. WINSLOW,)
) CASE NO. C10-0263-JLR
Plaintiff,)
)
v.) REPORT AND RECOMMENDATION
)
MARION FEATHER, et al.,)
)
Defendants.)
_____)

INTRODUCTION

Plaintiff Ted L. Winslow proceeds *pro se* and *in forma pauperis* in this civil rights action pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). He alleges a violation of his civil rights through the failure to repair or replace two broken hearing aids. Defendants Marion Feather, Warden of the Federal Detention Center (FDC) at SeaTac, and Dr. M. Aslam, FDC Medical Director, filed a motion to dismiss on the ground that plaintiff has not exhausted his administrative remedies as required by the Prison Litigation Reform Act (“PLRA”), 42 U.S.C. § 1997e(a). (Dkt. 14.)

Plaintiff did not respond to defendants’ motion. The Court construes this failure to

01 respond as an admission that the motion has merit. CR 7(b)(2). The Court further finds,
 02 having considered the motion and supporting documents, as well as the balance of the record in
 03 this matter, that defendants' motion should be granted and this case dismissed without prejudice
 04 for failure to exhaust.

05 BACKGROUND AND DISCUSSION

06 Although defendants move for dismissal based on lack of subject matter jurisdiction
 07 pursuant to Federal Rule of Civil Procedure 12(b)(1), their motion is properly brought as an
 08 unenumerated Rule 12(b) motion to dismiss for failure to exhaust nonjudicial remedies as
 09 required by the PLRA. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). In
 10 considering whether plaintiff exhausted his administrative remedies, the Court may consider
 11 documents beyond the pleadings and decide disputed issues of fact. *Id.* at 1119-20, 1120
 12 n.14.¹ If the Court concludes plaintiff failed to exhaust his nonjudicial remedies, his claims
 13 should be dismissed without prejudice. *Id.* at 1120.

14 Under the PLRA:

15 No action shall be brought with respect to prison conditions under section 1983
 16 of this title, or any other Federal law, by a prisoner confined in any jail, prison,
 17 or other correctional facility until such administrative remedies as are available
 are exhausted.

18 42 U.S.C. § 1997e(a). Exhaustion allows for the internal resolution of complaints, reduction
 19 of litigation, and, where complaints are not internally resolved, the preparation of a useful
 20 record. *Jones v. Bock*, 549 U.S. 199, 219 (2007) (citing *Woodford v. Ngo*, 548 U.S. 81, 88-91

21
 22 ¹ If a court looks beyond the complaint to decide exhaustion issues, a plaintiff must have "fair notice" of his right to develop a record. *Wyatt*, 315 F.3d at 1120 n.14. The Court provided plaintiff with the requisite notice. (Dkt. 17.)

01 (2006) and *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002)). “There is no question that
02 exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in
03 court.” *Id.* at 211. An inmate must properly exhaust a complaint, meaning “that a grievant
04 must use all steps the prison holds out, enabling the prison to reach the merits of the issue.”
05 *Griffin v. Arpaio*, 557 F.3d 1117, 1119 (9th Cir. 2009) (citing *Woodford*, 548 U.S. at 93).
06 Exhaustion applies to all actions relating to prison conditions, including those brought pursuant
07 to *Bivens*. *Porter*, 534 U.S. at 524, 532 (“[T]he PLRA’s exhaustion requirement applies to all
08 inmate suits about prison life, whether they involve general circumstances or particular
09 episodes, and whether they allege excessive force or some other wrong.”)

10 The federal Bureau of Prisons (“BOP”) utilizes the Administrative Remedy Program
11 (ARP) to process prisoner complaints. 28 C.F.R. §§ 542.10-542.19; (Dkt. 15, ¶4.) The ARP
12 has four levels of review. A prisoner must first seek informal resolution by submitting an
13 informal request to a staff member at the institution. 28 C.F.R. § 542.13(a). If dissatisfied
14 with the response, a prisoner must then file a formal complaint, or Request for Administrative
15 Remedy, with the Warden of the institution in which he is confined. *Id.* §§ 542.13, 542.14. If
16 the institution issues an unfavourable response, the inmate must appeal the decision with the
17 BOP Regional Director. *Id.* at § 542.15(a). If dissatisfied with the Regional Director’s
18 response, the inmate must appeal the decision with the BOP’s Central Office/General Counsel.
19 *Id.* An administrative appeal is not deemed exhausted until considered on the merits by the
20 Central Office. (Dkt. 15, ¶4.); 28 C.F.R. § 542.15(a) (“Appeal to the General Counsel is the
21 final administrative appeal.”)

22 Plaintiff states that his two hearing aids stopped functioning in June 2009, impacting his

01 ability to function in a variety of ways. (Dkt. 6 at 3.) He asserts that he notified a guard and
02 the medical department, asking that the hearing aids be repaired, and submitted numerous “cop
03 outs”, or informal resolution requests, to Dr. Aslam regarding his hearing aids. (*Id.*) Records
04 submitted by plaintiff reveal that the previous warden of the FDC informed plaintiff, in August
05 2009, that the BOP “does not fix inmate’s personal property[]” and that, in September 2009, the
06 BOP concluded that replacement and/or repair of plaintiff’s hearing aids was deemed not
07 ““Medically Necessary”” and declined for funding. (*Id.* at 5-6.)

08 Defendants confirm the denial of plaintiff’s requests for repair or replacement of his
09 hearing aids due to the conclusion that, while “somewhat impaired,” plaintiff’s hearing is
10 functional. (Dkt. 15, ¶6.) Defendants note, however, that arrangements were made, in
11 October 2009, to replace or repair one of plaintiff’s hearing aids at no cost to plaintiff because it
12 was still under warranty, that he received this hearing aid in December 2009, and that the FDC
13 Health Services Department regularly supplies replacement batteries for hearing aids. (*Id.*, ¶7
14 and Ex. E.) Defendants argue that, in any event, plaintiff never exhausted his administrative
15 remedies in relation to this issue. That is, while plaintiff filed one or more informal requests
16 seeking resolution, he failed to pursue his claims beyond those informal requests. (*See* Dkt. 6
17 at 2 and Dkt. 15, ¶5 and Attach. C.)

18 As argued by defendants, it is apparent that plaintiff did not exhaust his administrative
19 remedies. Plaintiff failed to answer a question in the form complaint he submitted asking
20 whether he had completed the grievance process, and he gave no indication in the statement of
21 his claim that he pursued more than informal attempts at resolution. (Dkt. 6 at 2-3.)
22 Documentation submitted by defendants confirms that plaintiff did not pursue any formal

01 administrative remedy. (Dkt. 15, ¶5 and Attach. C.) Plaintiff, therefore, failed to properly
02 exhaust his administrative remedies. *See* 28 C.F.R. §§ 542.13 – 542.15. Given the failure to
03 exhaust, plaintiff's claims are subject to dismissal without prejudice. *See* 42 U.S.C. §
04 1997e(a); *Jones*, 549 U.S. at 219; and *Wyatt*, 315 F.3d at 1120.

05 CONCLUSION

06 For the reasons stated above, defendants' motion to dismiss (Dkt. 14) should be granted
07 and this action dismissed without prejudice for failure to exhaust administrative remedies. A
08 proposed Order accompanies this Report and Recommendation.

09 DATED this 21st day of October, 2010.

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12 Mary Alice Theiler
13 United States Magistrate Judge
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